2013 IL App (1st) 113205-U

FIFTH DIVISION
December 27, 2013

No. 1-11-3205

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 12012
	)	
ZITTIE TAYLOR,	)	Honorable
	)	Lawrence Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court abused its discretion when it refused to instruct the jury regarding a lesser-included charge of simple possession of not more than 2.5 grams of cannabis when defendant presented some evidence in support of his theory at trial that he did not sell narcotics but merely possessed the small amount found on his person.

¶ 2 Following a jury trial, defendant Zittie Taylor was convicted of possession of more than 10, but not more than 30 grams of cannabis with intent to deliver within 1,000 feet of a school

and sentenced to an extended-term sentence of six years in prison. On appeal, defendant contends that he was denied due process when the trial court refused to instruct the jury on a lesser-included offense. In the alternative, defendant contends that his mittimus must be corrected to reflect the actual offense of which he was convicted. We reverse and remand.

¶ 3 Defendant was arrested and charged by information with, *inter alia,* possession of cannabis with intent to deliver within 1,000 feet of a school.

¶ 4 At trial, office Gerald Lee testified that on June 10, 2010, he conducted surveillance at 5409 South Laflin in Chicago. From his location across the street, he observed defendant speak to an African-American man. After that conversation, defendant, who was standing in front of 5411 South Laflin, relocated to 5409 South Laflin and entered the building. Lee was able to observe, through the "opaque" glass partition in the vestibule, as defendant bent or knelt down and picked something up. Defendant exited the building, returned to the African-American man, and a hand-to-hand transaction occurred. Although Lee could not see what defendant gave the man, he could see that defendant received money. Defendant then returned to 5411 South Laflin.

¶ 5 Fifteen to twenty minutes later, a man on a bicycle approached defendant. After a brief conversation, defendant and this man walked to 5409 South Laflin. There, defendant walked to one side of the building's stairs, bent over, and picked up a plastic bag. Lee, who was using binoculars, watched as defendant removed an item from this bag and then dropped the bag to the ground. Defendant gave the man on the bicycle a plastic bag in exchange for a $5 bill. Defendant then went back to 5411 South Laflin. After a few minutes, defendant went back to the base of the stairs at 5409 South Laflin, picked up the plastic bag, removed several items and put them in his pocket. Defendant then began walking away. Lee was afraid that defendant was leaving the area, so he radioed his fellow officers to detain defendant.

¶ 6 Officer Jonathan Shortall testified that when he detained defendant, defendant indicated that he had "some weed." Shortall recovered four Ziploc baggies containing suspect cannabis from defendant's waistband. The bags were marked with a "purple naked lady." Four hundred and sixty-nine dollars was also recovered from defendant. Defendant was placed in the back of a squad car and relocated to 5409 South Laflin. Once there, Lee directed Shortall to the south side of the porch. There, Shortall discovered a plastic sandwich bag of the type that is commonly used to store narcotics. It was empty. He then went to the building's vestibule where he located a clear bag which held 10 Ziploc bags containing suspect cannabis. These bags, as well as the baggies and currency recovered from defendant, were later inventoried.

¶ 7 State's Attorney Investigator Dennis Cullom testified that he measured the distance between 5409 South Laflin and Libby Elementary School, located at 5330 South Bishop. The distance is 631 feet.

¶ 8 Forensic scientist Adrienne Alley testified that the contents of the 10 Ziploc bags recovered from the vestibule weighed 12.6 grams and testified positive for cannabis. The contents of one of the baggies recovered from defendant weighed .2 gram and tested positive for cannabis. The other three baggies, which were not subjected to testing, weighed an estimated .8 gram.

¶ 9 Latavia Williams, defendant's girlfriend and the mother of his child, testified that on the day of defendant's arrest she watched defendant walk down the street from her location on the porch of 5436 South Laflin. She did not see defendant walk on the side of the street where 5409 South Laflin was located, speak to anyone, or engage in any "drug activity." They had been on the porch together for less than five minutes when officers arrived and asked defendant to come to the sidewalk. Defendant was searched, placed in a police car, and driven down the block to 5409 South Laflin.

¶ 10 Before closing arguments, the trial court granted the defense's request to instruct the jury on the lesser-included offense of possession of 10 grams or more of cannabis. The defense then requested that the jury also be instructed on the lesser-included charge of possession of not more than 2.5 grams of cannabis based upon the amount of cannabis recovered from defendant's person. The trial court denied this request. Ultimately, defendant was convicted of possession of more than 10 grams, but not more than 30 grams of cannabis with intent to deliver within 1,000 feet of a school and sentenced to an extended-term sentence of six years in prison.

¶ 11 On appeal, defendant contends that he was denied due process when the trial court denied his request to instruct the jury on the offense of possession of not more than 2.5 grams of cannabis. He argues that the evidence at trial supported this instruction when only four bags of cannabis were recovered from his person and Williams testified that she did not see him engage in any drug activity as he walked down South Laflin.

¶ 12 Our supreme court has held that the "function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct conclusion" *People v. Pierce,* 226 Ill. 2d 470, 475 (2007). A defendant is entitled to have the jury instructed on his theory of the case when the evidence provides some foundation for the instruction. *People v. Jones,* 175 Ill. 2d 126, 131-32 (1997); *People v. Sims,* 374 Ill. App. 3d 427, 432 (2007). Generally, the decision whether to give a jury instruction rests within sound discretion of the trial court. *People v. Jones,* 219 Ill. 2d 1, 31 (2006). Whether there is sufficient evidence in the record to support the giving of a jury instruction is a question of law that we review *de novo*. *People v. Washington,* 2012 IL 110283, ¶ 19; see also *People v. Tijerina,* 381 Ill. App. 3d 1024, 1030 (2008) (whether a defendant has met the evidentiary minimum for a specific jury instruction is reviewed *de novo*).

¶ 13 A two-part analysis is used to determine whether a trial court must instruct the jury on a lesser offense. *People v. Ceja,* 204 Ill. 2d 332, 360 (2003). First, the court must determine whether the charging instrument describes the lesser offense. *Ceja,* 204 Ill. 2d at 360. If the charging instrument identifies a lesser-included offense, the evidence presented at trial must rationally support a conviction on that lesser-included offense. *Ceja,* 204 Ill. 2d at 360. A court must examine the evidence adduced at trial to determine whether this evidence would permit the jury to rationally find the defendant guilty of the lesser-included offense and innocent of the greater offense. *Ceja,* 204 Ill. 2d at 360. Although a defendant is entitled to an instruction on a lesser-included offense if there is any evidence tending to establish the commission of the lesser offense, rather than the greater one (*People v. Scott,* 256 Ill. App. 3d 844, 850 (1993)), such an instruction is not required when the evidence at trial shows that the defendant is either guilty of the greater offense or not guilty of any offense (*People v. Cardamone,* 381 Ill. App. 3d 462, 508 (2008)).

¶ 14 The parties agree that possession of not more than 2.5 grams of cannabis is a lesser-included offense of possession of cannabis with intent to deliver. Therefore, the question before this court is whether the evidence presented at trial would have permitted the jury to find defendant guilty of possession of not more than 2.5 grams of cannabis, but acquit him of the greater offense of possession of cannabis with intent to deliver.

¶ 15 When the evidence at trial is sufficient to give rise to an inference of the intent to deliver, an instruction on the lesser offense of possession is required when that same evidence could also support an inference of mere possession. *Scott*, 256 Ill. App. 3d at 850. In the case at bar, defendant presented some evidence (*Jones,* 175 Ill. 2d at 131-32), to support his defense at trial that he did not approach or enter the building at 5409 South Laflin*, i.e.,* he did not engage in two hand-to-hand-transactions. Specifically, defendant's girlfriend testified that as she watched

defendant walk down the street she did not see him walk on the side of the street where 5409 South Laflin was located, speak to anyone, or engage in any "drug activity." If the jury found Williams credible, it could have rationally found defendant guilty of the lesser-included offense of possession of not more than 2.5 grams of cannabis and innocent of the greater offense of possession with intent to deliver. *Ceja,* 204 Ill. 2d at 360. Consequently, this court concludes that the trial court abused its discretion when it refused defendant's request to instruct the jury on the lesser-included offense of possession of not more than 2.5 grams of cannabis (*Jones,* 219 Ill. 2d at 31), when the defendant presented some evidence to justify the instruction through the testimony of Williams. See, *e.g., People v. Everette*, 141 Ill. 2d 147, 156-57 (1990) (a defendant is entitled to a jury instruction regarding, for example, self-defense if "slight" or "some" evidence exists to support the theory of self-defense).

¶ 16 This court is unpersuaded by the State's reliance on *People v. Dunn*, 49 Ill. App. 3d 1002 (1977). There, the reviewing court determined that the trial court did not err when it refused to instruct the jury on simple possession when an undercover police officer testified that the defendant sold her a bag of narcotics in exchange for $1,400 and the defense did not present any witnesses. The court noted that no evidence impeached the officer's testimony or indicated that the defendant was in possession but did not have the intention to deliver. *Dunn*, 49 Ill. App. 3d at 1010. The court concluded that although a person must possess narcotics in order to deliver said narcotics, an instruction on possession is not warranted when no evidence is introduced to support the lesser offense of possession, and in that case, the defendant did not rebut the State's evidence that he sold cocaine or introduce any evidence that he was in mere possession only. *Dunn*, 49 Ill. App. 3d at 1010.

¶ 17 In the case at bar, on the other hand, defendant presented the testimony of Williams, who testified not only that she did not see defendant speak to anyone or engage in any drug activity,

but also that he did not walk on the side of the street where 5409 South Laflin was located. Unlike *Dunn*, here, defendant presented some evidence to rebut the State's evidence that he engaged in two narcotics transactions and asserted during closing argument that he had purchased the cannabis recovered from his person for his personal use. See *Dunn*, 49 Ill. App. 3d at 1010 (finding that the defendant was not entitled to an instruction on mere possession when no evidence rebutted the State's evidence that he sold narcotics or asserted that he was merely in possession of the narcotics at issue).

¶ 18 Ultimately, because the evidence at trial, through Williams's testimony, provided some foundation for defendant's theory of the case (*Jones,* 175 Ill. 2d at 131-32), defendant was entitled to have the jury instructed on the lesser-included charge of possession of not more than 2.5 grams of cannabis (*Washington,* 2012 IL 110283, ¶ 19) and the trial court abused its discretion when it refused to provide such an instruction. Therefore, we reverse the trial court's judgment and remand for a new trial.

¶ 19 Because we remand this cause for a new trial, this court need not address defendant's contention regarding his mittimus.

¶ 20 Accordingly, for the reasons stated above, the order of the circuit court of Cook County is reversed, and the cause is remanded for a new trial.

¶ 21 Reversed and remanded